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In the Supreme Court of the United States

OCTOBER TERM, 1996

CHARLES J. JENKINS,
Petitioner

V.

UNITED STATES POSTAL SERVICE, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHARLES J. JENKINS
PRO SE PETITIONER
11261 N. IDLEWOOD COURT
NEW ORLEANS, LA 70128
504-243-0454

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

57 pp

QUESTIONS TO BE PRESENTED

I.

Whether the United States Court of Appeal for the Federal Circuit has so far departed from the accepted and usual course of judicial proceeding, or sanctioned such a departure by the lower Court, or whether the asserted errors cited by petitioner consisted of erroneous factual finding or the misapplication of a properly stated rule of law, when the Appeals Court for the Federal Circuit affirmed the Merit Systems Protection Board (Board) decision to deny this petitioner an evidentiary hearing with respect to jurisdiction. The panel said that "a merely conclusory pleading is insufficient" with regards to petitioner's argument that he was removed from his position for reasons substantially related to his compensable injury. Additionally, the panel said "Thus, this case is unlike *Roche* 828 F. 2d at 1558, where the appellant both specifically alleged that his termination was due to his injury and submitted a doctor's report to support the allegation that his termination was related to his injury." This is so, despite the fact that this petitioner exhibited in his combined rehearing and suggestion for rehearing in banc the type and kind of evidence (e. g. medical evidence) to support his contention that his removal was related to his injury, thus like *Roche Id.*

QUESTION PRESENTED

II.

Whether the panel of the U. S. Court of Appeal for the Federal Circuit has entered a decision in conflict with the U. S. Court of Appeal for the Ninth Circuit on the matter of an agency offer of restoration to a partially recovered employee following a compensable injury was so unreasonable as to be an effective denial of restoration, and thus was within the jurisdiction of the Board.

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In The
Supreme Court of the United States
October Term 1996

CHARLES J. JENKINS,
PETITIONER,

V

UNITED STATES POSTAL SERVICE, ET AL.,
OFFICE OF PERSONNEL MANAGEMENT (OPM)
DEPARTMENT OF LABOR (OWCP)
U. S. POSTAL SERVICE SUPERVISOR
BARRY J. TAQUINO
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Opinion Below

The opinion of the United States Court of Appeal for the Federal Circuit has determined that the disposition of this case is not citable as precedent. It is a public record. The disposition will appear in table publish periodically pursuant to Fed. Cir. R. 47.6 and attached hereto in appendix-A. The decision of the Merit Systems Protection Board appears in appendix-B attached hereto.

Jurisdiction

The United States Court of Appeal for the Federal Circuit filed an opinion in this matter on December 9, 1996. A timely petition for combined rehearing and suggestion for rehearing in banc was filed and denied on January 21, 1997, and is set forth in appendix-C. This Court's jurisdiction is invoked under Title 28 USC § 1254 (1).

Constitutional, Statutory and Regulations Involved

U. S. Constitutional Amendment 5 and 14 denial of due process and equal protection of the law, Statutes 5 USC 8106 (c) (2), 8151 (B) (1) (2), and 5 CFR 353.401 (a) (3), 353.306 and 20 CFR 10.123.

Statement of the Case

This is the second application for a writ to the U. S. Supreme Court in this case for virtually the same issue. The first writ was denied on January 8, 1995, See *Charles J. Jenkins v. U. S. of America* ET AL., S. Ct. no. 95-0756. In that case the United States Court of Appeal for the Fifth Circuit docket number 94-30715 opined that this petitioner's claims are covered under the Civil Service Retirement Act (CSRA) in accordance with *Bush v. Lucas,* 103 S. Ct. 2404 (1983). Subsequently this action is a result of that opinion.

Petitioner, Charles J. Jenkins, was hired as a letter carrier by the U. S. Postal Service in 1972 with the status of a preference eligible disabled Vietnam veteran. In 1974 petitioner sustained an on the job knee injury and in 1979 he had subsequent knee surgery. While recovering from knee surgery he sustained a compensable back injury. Petitioner could not return to his position as a letter carrier and was assigned to a (modified) clerk position in late 1979-1980 working the evening shift for 5:00 p.m. to 1:30 a.m. In 1982 petitioner was offered a permanent modified distribution clerk position with a tour of duty from 9:30 p.m. to 6:00 a.m. Petitioner was told that he had the option to file for disability retirement through the Office of Personnel Management and that should petitioner not elect to accept the limited duty position of modified distribution clerk further injury compensation benefits may be jeopardize and his position with the Postal Service will be terminated. See job offer tab-1 Petitioner's initial appeal to the MSPB February 2, 1996.

Petitioner accepted the modified distribution clerk job and as per instruction appealed its suitability to the MSPB, but the appeal was dismissed for lack of jurisdiction because he was given erroneous appellate rights to for a job suitability determination. When petitioner requested the correct appeal rights for a job suitability determination, he was duped again because he was told by respondent, Injury Compensation Supervisor, Barry J. Taquino, to appeal the job offer suitability to the Equal Employment Opportunity (EEO). Nevertheless, petitioner worked in this unsuitable, modified

distribution clerk position until August 14, 1987 when he was removed for a second time and up to the date of this action the job offer has not been determined suitable as required by 5 USC § 8106 (c) (2). As a result, this petitioner lost substantial wages and back-pay during the period from 1980 to 1990. Some of the lost wages and back-pay was attributable to the FECA and the remaining is attributable the unwarranted or unjustified personnel action which is the subject of the instant case.

On October 11, 1990 the OWCP accepted this petitioner's emotional injury claim dating back to 1980 when this petition was first assigned to do clerk duties. The FECA reimbursed the petitioner for the lost wages that were covered by medical documentation for the period 1980 to 1990. However, at last count there is some $83,571.59 in lost wages, back-pay and other benefits that are due this petitioner based upon the unwarranted or unjustified personnel action occurring during the period of the unsuitable job offer (i.e. 1980 to 1987) pursuant to the Back Pay Act 5 USC § 5596.

Since this petitioner was coerced into accepting and working in a job that was never determined to be suitable as required by statute i.e. 5 USC § 8106 (C) (2), not only has that statute been transgressed but it also constitute the job offer being so unreasonable as to be an effective denial of restoration, and thus within the Board's jurisdiction. The court of first instance in this case is the MSPB, therefore the basis for jurisdiction is pursuant to 28 USC § 1346 and/or 5 USC § 7701.

Reason for granting the writ

Certiorri should be granted in this case because the panel for the United States Court of Appeal for the Federal Circuit has so far departed from the accepted and usual course of judicial proceeding and has rendered a conflicting opinion with that of the Ninth Circuit in a similar case as to call for an exercise of this Court's power of supervision.

Arguments to Issue 1

Petitioner contends that the United States Court of

Appeal for the Federal Circuit has departed from the accepted and usual course of judicial proceeding. In dissecting the anatomy of this departure we should first look at the cases cited in the panel's decision. Specifically, *Stokes v. Federal Aviation Administration,* 761 F. 2d 682 (Fed. Cir. 1985).[1]

As petitioneer has alluded to in his combined rehearing and suggestion for rehearing in banc at p 8, when the panel stated in its decision at 4 "a merely conclusory pleading is insufficient" that was misleading because of the context it was used in the instant case. Once again, *Stokes* at 686 says that "Thus the probationary employee faces initially a two step process." First he made a non frivolous allegation of marital discrimination supported by factual assertions indicating that the allegation is not pro forma and therefore *Stokes* had a right to a hearing because a merely conclusory pleading is insufficient see also *Burgess v. Merit Systems Protection Board,* 758 F. 2d 641 (Fed. Cir. 1985). Secondly, at the hearing *Stokes* had to support his allegation with a showing of facts which would, if not controverted, require a finding that marital discrimination was the basis of his discharge.

Applying *Stokes* to petitioner's case we see that the panel acknowledges that this petitioner met the first step when it said in its decisions at 4 "...Jenkins also clearly raise the issue of the appropriateness of his removal by stating he was removed in 1987 due to a compensable injury and by citing relevant case law. See *Roche,*, 828 F. 2d at 1558 (holding petitioner had sufficiently alleged he was removed due to a compensable injury where petitioner cited relevent statute and regulation, cited and explained relevant cases, and submitted a doctor's report)...." In the instant case the agency never attacked the truth of that showing, directly or by establishing a legitimate or a nondiscriminatory basis for its adverse action, or both.

Under OPM's regulations, the Federal Personnel

[1] Although *Stokes* deals with a probationary employee and marital discrimination, this is the case that the panel cited to show the elements involved that is needed for this petitioner to prove his claim.

Manual at chapter 353 subchapter 2, 2-6a(1) says "the agency is required to restore the employee unless he or she was separated because of reduction in force, for cause, or for other reasons unrelated to the injury."

In order for this petitioner to meet the second step of the process a fact hearing is required, See Stokes at 684. Apparently the Board decided and the panel agreed that the instant case did not warrant a hearing even though petitioner's non frivolous allegation went uncontroverted which require a finding of being terminated for reasons related to his compensable injury. Undaunted by this departure of accepted and usual judicial proceeding this petitioner attempted to meet the second step of the process cited in *Stokes* by following the guidance from the panel in its decision at 4 and 5 which says:

> Thus, this case is unlike Roche, 828 F.2d at 1558, where the appellant both specifically allege that his termination was due to his injury and submitted a doctor's report to support the allegation that his termination was related to his injury.

In his combined rehearing and suggestion for rehearing in banc and appendix at A-16 this petitioner produced just such a medical report from his attending Dr. George Dunn who opined in a 1987 report that the problems this petitioner has on his job is certainly related to his work related injury and that the job he was performing was incompatible with his condition. It is noteworthy at this juncture to mention that Dr. Dunn was not given the opportunity to ratify, sign-off or release this petitioner for the job offer of 1982 despite the fact that Respondent, Injury Compensation Supervisor, Barry J. Taquino had prior knowledge of Dr. Dunn and petitioner, physician-patient relationship as early as 1980, (See appendix D note of Dr. Dunn 8/1/80 and U.S. Postal Service superimposed stamp of receipt August 8, 1980) which indicates that Respondent, Taquino, intentionally withheld petitioner's attending physician, Dr. Dunns' input with respect to said job offer.

Now, with this medical report, petitioner's case is not

unlike *Roche* at 1558, because like *Roche* they both specifically allege that their termination was due to their injury and both submitted doctors reports to support their allegation that their termination was related to their injury. However, the in banc panel choose to depart from the very guidance they provided when they cited *Stokes*. I suggest to this Honorable Court that this action by the panel is a departure from the accepted and usual judicial proceeding, unless the right to a hearing is really a facade as described in *Stokes* at 687 which states that:

> ...If the Board determines on the entire record that a probationary employee was discharged on the sole basis of marital discrimination, it would presumably order reinstatement (if the grant of the right to appeal is not to be rendered a facade)...

Since this petitioner's factual showing went uncontroverted, (i.e. non frivolous allegation of removal for reasons related to his compensable injury and a doctor's report to support his allegation) in the language of *Stokes Id.* the Board must consider the merits of the termination. And since jurisdiction and the merits are inextricably intertwined in this case, (See *Schultz v. United States Navy,* 810 F. 2d 1133, 1136 (Fed. Cir. 1987), *Dumas v. Merit Systems Protection Board,* 789 F. 2d 892, 894 (Fed. Cir. 1986) and *Covington v. Department of Health and Human Services,* 750 F. 2d 937, 943 Fed. Cir. (1984)) the petitioner wins on the merits. For an expansive discussion on the issue of jurisdiction and merits being inextricably intertwined in this case refer to petitioner's response in opposition to respondent's motion to recaption filed on August, 28, 1996 and made part of the record through an amended order by the Federal Circuit Court on October 8, 1996, because the Court had originally ruled that this petitioner had not filed a response to respondent's motion. However, the Court corrected its error.

Argument to Issue 2

The panel for the U.S. Court of Appeal for the Federal Circuit affirmed the decision of the Board and denied jurisdiction in this petitioner's case. The panel relied upon

Bearksdale v. United States Postal Service, 31 MSPR 305 (1985) as the controlling case. *Bearksdale* as reported in the Merit Systems Protection reporter (MSPR) only include two paragraph which are redundant and says:

> "Employees who were only partially recovered from compensable injuries and who were returned to limited duty positions were not denied restoration, and thus they had no right of appeal to the Merit Systems Protection Board.

Since no other information about Bearksdale was provided by the MSPR. This petitoner set out to retrieve further information about Bearksdale because he needed to know whether his case was distinguishable from *Bearksdale.* On January 31, 1997, this petitioner called the Board in Washington D C and was told that no such records exist on *Bearksdale* because the Board only keeps those record for seven years and then they are destroyed.

The irony of the *Bearksdale* record request is that the panel in its decision at 4 and 5 says "...Thus, this case is unlike *Roche* 828 F. 2d at 1558, where the appellant both specifically alleged that his termination was due to his injury and submitted a doctor's report to support the allegation that his termination was related to his injury..." Therfore, the panel was able to make a distinction between petitioner's case and *Roche's* case. However, this petitioner has been prejudice by the fact that because of the destruction and unavailability of *Bearksdale's* records, including the name of his attorney of record, he is unable to distinguish *Bearksdale* from his case through the normal method of comparing and contrasting.

Nevertheless, this petitioner will proceed to compare and contrast his case to another similar case (i.e. *Jones v. United States Postal Systems,* 722 F. 2d 745 (9th Cir. 1983)) which has a conflicting opinion or memorandum to that of the petitioner's case. Also, petitioner will expand upon a possible clashing of statutes i.e. 5 USC § 8151 b and 5 USC § 8106 (C) (2). But first, this petitioner feel compel to reply to a statement in the panel's decision at 5 which said that:

> Jenkins makes several other arguments unrelated to jurisdiction, e.g., the Board erred when it stated he had retired in 1987 and the Board erred in denying Jenkins motion to compel discovery. We see no merit to these arguments. In any event, as they do not bear on the only issue we need to review, jurisdiction, we need not decide them.

Besides the two arguments mentioned above, there are other claims which have not been abandon by this petitioner and this Honorable Court is the body to decide whether the lower Court have jurisdiction over these issues. (i.e. denial of due process and equal protection of the law, invasion of privacy i. e. tapping into the Equifax computer and withdrawing petitioner's credit report without his consent during a time when petitioner was retired from the agency for several years, discrimination against a handicap employee, civil rights violation pursuant to 42 USC § 1985, OPMs' refusal to reimburse health benefit and a violation of petitioner's protected activity as a union official.

Now, with regards to the Statutory violation, this petitioner has said all along that jurisdiction may lie with the Federal Circuit Court when there is a statutory violation and in fact cited cases to that effect in his combined rehearing and suggestion for rehearing in banc at pp 11-14. Evidently, the panel felt that this contention was legally impotent. However, petitioner contends that not just a statutory transgression has occurred but maybe OPM has promulgated regulations embodied under 5 CFR § 353 which has in effect usurped or for the lack of a better term, is clashing with another statute within the FECA i.e. 5 USC § 8106 (c) (2). To explore this allegation, we must first decipher the controlling case cited by the panel i. e. *Bearksdale*. Remember what *Bearksdale* said:

> Employees who were only partially recovered from compensable injuries and who were returned to limited duty positions were not denied restoration and thus, they had no right of appeal to the Merit Systems Protection Board.

Apparently, the quote above is cited as 5 CFR § 353. 401 (a) (3). In a consolidation opinion and order of the cases *Neil S. Yates v. United States Postal Service*, docket number DA 035309009, *Catherine Russell v Veteran Administration*, DA 035309005 and *Jean R. Wiggings v United States Postal Service*, DA 035309012 (1981) at 505 it was revealed pursuant to FECA statute 5 USC § 8151 Congress gaved OPM the authority to promulgate regulations under section 353 of the CFR and in fact OPM did just that when it amended section 353.306 and 353.401(a)(3) to accord partially recovered employees restoration right only if the agency has acted arbitrarily and capriciously in denying them restoration.

However, there is another FECA statute which appears to be at odds with the promulgation of the rules or amendments cited above, for instance, FECA statute 5 USC 8106(c)(2) provides in pertinent part that, "A partially disabled employee who...(2) refuses or neglects to work after suitable work is offered to, procured by, or secured for him is not entitled to compensation." The CFR which interpret this statute i.e. 20 CFR 10.123 (1982) and the Employee Compensation Appeals Board (ECAB) which is the highest appellate body in the FECA, have cases which interpret this statute to require any job offer made under the guise of the Joint department of Labor / U.S. Postal Service Rehabilitation Program Guidelines must be determined suitable by the Office of Workers Compensation Program which did not happen in the instant case. See *Harry B. Topping, Jr.*, 33 ECAB 341, 345 (1981). Therefore, the dichotomy are that on one hand you have a partially recovered employee under 5 CFR 353.401 (a) (3) who cannot appeal *the type of restoration* only the denial, and on the other hand as in the instant case, that same partially recovered employee is saying the problem is *the type of restoration* because the job offer was never determined to be suitable as per 5 USC § 8106 (c) (2).

If the instant case remains affirmed, then 5 CFR 353.401 (a) (3) has superseded 5 USC 8106 (c) (2). As a result, OPM under the authority of the FECA statute 5 USC 8151 has promulgating regulations pursuant to 5 CFR 353.401(a)(3)

which restricts a partially recovered employee appeal rights to whether the agency is acting arbitrary and capriciously in denying him restoration. In the instant case since this petitioner was not denied restoration, he has no right of appeal. This is so despite the fact that another statute within the FECA (i. e. 5 USC 8106(c)(2)) requires any job offer to be determined suitable. In effect, what we have here is that, the agency has offered a job to a partially recovered employee of which the agency knows is unsuitable for his condition but can ignore the suitability requirements pursuant to the statute (i. e. 5 USC 8106(c)(2)) because the agency knows that according to 5 CFR 353.306 and 353.401(a)(3) the partially recovered employee cannot appeal the type of restoration, only the denial of restoration regardless of job suitability.. The closest analogy I can come up with is akin to *Taylor v. Garrett,* 820 F. Supp 933, 937-39 (E.D. Pa. 1993), that Court said:

> If one was to accept the Navy's rigid definition of the position in question an employer who choose to reassign to light duty work an employee who has become unable to perform his original job would have an unsettling carte blanche power over that employee. During the course of the handicapped worker's light duty employment, the employer would be able, without any sanction under the rehabilitation act, to harass that worker because of his handicap, fail reasonably to accommodate that worker's disability, or otherwise engage in handicap based discrimination simply because the employee was not qualified for a position that had nothing to do with his current work. The result is particularly egregious where, if plaintiff contentions are to be believed PSNY's temporary light duty placement system is itself designed to harm disabled workers, and disabled workers such as *Taylor*, who are forced to accept offers of suitable employment in order to remain eligible for workers compensation benefit, return to PSNY to encounter inadequate accommodation of their disabilities within their light duty assignment and a hostile work environment.

This petitioner does not believe that when Congress gave OPM the authority under FECA statute 5 USC 8151 to promulgate regulations pursuant to 5 CFR 353 (covering the rights of employees whose injuries or disabilities are partially overcome, as well as those who has fully overcome their disabilities) would in effect usurp another FECA statute i.e. 5 USC 8106 (C) (2) during the process of promulgating those regulations. Also, this petitioner believes Jones said it best in her initial brief at 11 when she said that "...Under 5 CFR § 353.306, the agency is obligated to do more than make an offer of just *any* job. If it is not a job which the employee can do within that employee's limitations, then the agency has not operated within their mandate and an offer within the meaning of the law has not taken place. What has taken place is an effective denial of restoration.... To construe these various regulations otherwise leads to the inequitable result of putting a partially recovered employee at the total mercy of an agency who makes an offer, as in the instant case, that is totally inconsistent with what that employee can or cannot do..." This is exactly what happen in the case at bar.

Conflicting Opinions Among the Federal Courts of Appeal

Before we discuss whether the United States Court of Appeal for the Federal Circuit has issued a conflicting opinion or memorandum with the Federal Appeal Court for the Ninth Circuit on a similar claim or issue, we should first decide whether the contention of a job offer being so unreasonable as to be an effective denial of restoration was ever claimed by this petitioner? Petitioner asserts that he made such a claim. To prove this contention we need look no further than the instant case panel's opinion at 2 and 3 which states that "...In sum, he contended that the modified distribution clerk position was not a suitable position and therefore he was never properly restored. In addition, Jenkins wrote:

As a result of the job offer never being determined

> suitable as required by 5 USC 8106(C)(2), the appellant was never properly restored to duty and was removed on August 14, 1987, due to a compensable injury or for reasons substantially to a compensable injury..."

This petitioner contends that the terms so unreasonable and unsuitable are synonymous when used in the context of the instant case and later on in this petition we will see how another case i.e. *Jones Id.* equates unsuitable and so unreasonable synonymously. Even the Federal Circuit Court in *Roche* at 1558 says:

> Pro se petitioners are not expected to frame issues with the precision of a common law pleading. *Roche* has not just raise a justiciable issue in language which may be so read as to constitute a sufficient allegation; the allegation fairly leaps off the pages of his submission...

Assuming that petitioner has established that the allegation was made, (i.e. that the job was unsuitable or so unreasonable as to be an effective denial of restoration) then the question arises as to whether there is a precedent for such a contention. We find in *Myrick v. United States Postal Service,* 21 MSPR 79 (1994) n 2 says:

> The Board notes that under appropriate circumstances, it might find a partial restoration to be so unreasonable as to be an effective denial of restoration and thus, within the Board's jurisdiction. See *Jones v United States Postal Service,* 722 F. 2d 745 (9th Cir. 1983 unpublished); *Phillips v. United States Postal Service,* 8 MSPB 459 (1981). In this case, however, appellant's claim does not arguably present such a situation so the board need not consider its jurisdiction in such an instance.

As in *Myrick supra,* apparently the panel felt that this petitioner's case did not arguably present such a situation where the job offer was unsuitable or so unreasonable as to be an effective denial of restoration. Therefore, this petitioner

set out to find exactly what criteria was used in determining what constitute a job offer to be unsuitable or so unreasonable as to be an effective denial of restoration and thus within the Board jurisdiction. For guidance in this search petitioner scrutinize the case of *Jones v. United States Postal Service,* 722 F. 2d 745 (9th Cir. 1983 unpublished opinion). Persuing the briefs of both the Petitioner-Appellant, Jones, and Respondent-Appellee, United States Postal Service, the following information was gleaned. In Respondent-Appellee's brief at pp. 4-6 *Statement of the fact* says:

> Burlene Jones was originally employed as a city carrier by the U.S. Postal Service at the Oakland, California, Post Office on April 22, 1967. She sustained an on-the-job injury on may 29, 1968. This injury resulted in some damage to her right wrist and cervical spine. As a consequence, Jones was unable to perform her duties as a carrier. Subsequently, she was reassigned to the position of Distribution Clerk. (A.R., 69-70; T. 143-151). During this period Jones also participated in the Joint Rehabilitation Program of the Department of Labor and U.S. Postal Service. (A.R. 44; T. 11-13, 264-278).
>
> As a Distribution Clerk, Jones was assigned to various detail positions up until June 6, 1975, at which time she was placed in a non-duty, non-pay status. (detailed positions means that petitioner was placed in temporary assignments in keeping with her physical limitations). On May 5, 1977, she was placed on disability retirement, Jones, who has been receiving Workers' Compensation benefits, has not returned to duty with the Postal Service since then. (A.R. 15, 69-70; T. 142-151).
>
> By letter dated September 19, 1980, Oakland MSC Manager/Postmaster, Austin Simon was advised by Mr. E. C. Hinson of the Division of Vocational Rehhabilitation, Office of Workers' Compensation Programs (OWCP), U.S. Department of Labor, that a medical

> evaluation of Jones, conducted by Dr. Harold J. Eisenberg, her attending physician, indicated that, with proper placement, Jones could once again become a productive employee of the Postal Service. (A.R. 24-26). The concept of returning an injured, former employee to duty is consistent with the goals of the Rehabilitation program. (T. 13-16, 265).
>
> As a result, on October 10, 1980, Jones was notified that her file had been referred by the OWCP to the Oakland Post Office for consideration of reemployment as a disabled former employee. After reviewing her file, Oakland management scheduled Jones for a pre-employment physicial examination with Dr. Edward Goldstein. (A.R. 22).
>
> She was examined on October 20, 1980, and found to be physically fit for employment, with certain restrictions, as noted by her attending physician, Dr. Eisenberg (A.R. 18-21). On January 16, 1981, the Oakland Post Office made Jones an offer of re-employment as a Distribution clerk. The offer specifically stated that, "[a]ll assigned duties will be in strict compliance with your limitations as prescribed by your physician." She was asked to accept or reject the position and was advised that she could appeal to the MSPB if she believed the position did not constitute a "proper restoration." (A.R. 16 and 99).

Jones's initial brief at pp 2-4 says;

> The Petitioner-Appellant, hereinafter referred to as Mrs. Jones, was employed by the U.S. Postal Service when she sustained an on-the job injury in 1968 which left her permanently disabled. Due to her disability, she was finally forced to retire from her position with the Post Office in 1977. She was no longer able to perform the duties that went with her position of distribution clerk.

The Notification of Personnel Action, signed by regional Postmaster General Joseph F. Morris, indicates that Mrs. Jones was "unable to complete the duties of distribution clerk due to cervical strain and ridiculetis (probable cervical disc syndrome)...." The matter was transferred to the Office of Workers' compensation. From Mrs. Jones' retirement date up to the present, she has received OWCP benefits. She has also readily submitted to extensive rehabilitation under the guidance of the California State Department of Rehabilitation.

In the fall of 1980, she was forced to terminate her rehabilitation efforts (studies which were leading toward her qualification as a probation officer) because she was informed that an offer of re-employment by the Postal Service was eminent and that if such offer were not accepted, a termination of her benefit would result.

Shortly thereafter, Petitioner received correspondence relating to re-employment from Austin Simon, Postmaster, and E.C. Hinson, Division of Vacational Rehabilitation. At the Post Office's request, she underwent a pre-employment physicial examination by Dr. Goldstein who stated that he concurred with Mrs. Jones' trading physician, Dr. Eisenberg. Dr. Eisenberg stated, inter alia, that he felt Mrs. Jones could engage only in tasks of a supervisory nature.

In spite of this, Jones was offered a position as full time night distribution clerk, the very same position which she was forced to retire from due to her disability in the first place. At Mrs. Jones' request, she was then provided with a "general summary of the duties that may be performed." This description was only provided at Mrs. Jones' insistence and was not provided until after the offer of re-employment was made. Mrs. Jones, having personal knowledge of these described duties (since she had performed the job previously) knew that she could not perform them now safely and without peril.

Mrs. Jones' rehabilitation specialist, Jan Carnell, in a written statement, set forth that she felt Mrs. Jones was unable to perform those duties of a distribution clerk. (See Exhibit "A"). The treating physician, Dr. Eisenberg, then reemphasized, again in writing, that her job should be of a supervisory nature only, and stressed that night work was contraindicated. (See Exhibit C-1 and C-2).

Still, the offer remained outstanding and unaltered by the Postal Service. To accept the offer, meant subjecting herself to potential physicial harm since the position was the same one she had to retire from earlier because she was unable to physically tolerate it. To reject the offer, meant the loss of her monthly benefits which she relies on in order to exist.

The only other option, and for all practical purposes, Mrs. Jones' only real and safe choice, was to appeal the agency's decision, not on the basis that the particular restoration was neither suitable, appropriate nor conductive to Mrs. Jones' health and physicial well-being.

It is noteworthy that the agency's written offer of re-employment (Exhibit "B") expressly states:

> "If you believe that this position is not a proper restoration, you may appeal to the Merit Systems Protection Board. Such an appeal must be filed within twenty (20) days of re-employment *or of the position offer.*" (Emphasis added)

Mrs. Jones observed the guidelines of the agency and appealed the agency action within twenty days. A hearing was held on April 15, 1981, at the San Francisco Field Office of the Merit Systems Protection Board. Mrs. Jones alleges that the agency's act constituted either an improper restoration or an effective denial of restoration, either of which would vest the Merit Systems Pro-

tection Board with jurisdiction to act.

In comparing the instant case to *Jones'* we find the following similarities. Like *Jones'* case this petitioner was employed as a city carrier in the New Orleans Post Office since 1972 and in 1974 this petitioner sustained an on the job knee injury. This injury resulted in knee surgery in 1979, a consequential back injury and an emotional stress injury both compensable and occurring in 1980. As a result of his knee injury this petitioner like *Jones,* was unable to perform his duties as a letter carrier and was reassigned to a limited duty distribution clerk position. This limited duty position was suppose to be under the guidelines of the Joint Department of Labor/ U. S. Postal Service Rehabilitation Program.

Like *Jones,* petitioner was assigned to various detailed position until January of 1982, when the U. S. Postal Service decided to make him a permanent job offer. however, that job offer was withdrawn by the U. S. Postal Service and on April 17, 1982, another scaled down version of the same offer was again offered (See job offer April 5, 1982 Petitioner's initial appeal to the MSPB Tab T). Like Jones' offer, petitioners' offer stated that "all assigned duties will be in strict compliance with your limitations as prescribed by your physician" and was asked to accept or reject the position and was advised, however, that petitioner could appeal to the MSPB the suitability of this position rather than appealing an improper restoration like Jones. Nevertheless, like *Jones* this petitioner appealed to the MSPB, but the U. S. Postal Service admitted it erred in advising petitioner to appeal the *suitability* of the job offer to the MSPB and the appeal was dismissed.

This petitioner never received a *suitability* determination from the OWCP on this job offer and worked this job until 1986 when he was removed from this position and returned after 6 weeks through a settlement agreement and was removed again on August 14, 1987. In November 1990, the OWCP accepted this petitioner emotional stress injury

dating back to 1980 and like *Jones,* petitioner has been receiving workers' compensation benefits ever since. This petitioner soon thereafter requested disbursement of his lost wages and back pay for the period between 1980 to 1987. Like *Jones,* this petitioner claims jurisdiction should lie with MSPB not on the fact that a restoration was never attempted, but on the basis that the particular restoration, *was* neither suitable, appropriate nor conductive to this petitioner's physicial and mental health. Especially, since petitioner's attending Dr. George Dunn, did not ratify the job offer. In fact, Respondent, U. S. Postal Service, once again, violated its own regulations when it avoided giving this Petitioner a re-employment physicial examination like *Jones.* This petitioner will expand upon the re-employment physicial examination later on in this writ. (But see U. S. Postal Service-Employee and Labor Relations Manual Subchapter 546.33 USPS Medical Review 6/15/82.

Issues on both side of Jones, ruling by the Court, Comparing and Contrasting Jones's case to petitioner's case

Jones contended the issues were "[whether] a partially recovered injured postal worker who has been retired under disability with OWCP benefit, appeal to the MSPB when she is suddenly force to choose between: 1. Returning to work, at her peril, to the identical position she was earlier force to retire from due to her disability, or 2. lose her monthly OWCP benefits which she has wholly relied on for a number of years for her living?" Jones' initial brief at 11 and 12 says:

> The question then becomes, has there been a denial of restoration by the Post Office? In a case where the job offer is that of the very job which the employee had to retire from because she could not perform it, there is an effective denial of restoration. In a case where the job offered is contraindicated by the employee's treating physician and rehabilitation counselor, there is an effective denial of restoration. Both situation exist here.

> The agency did make a job offer. However, under 5 CFR 353.306, the agency is obligated to do more than make a job offer of just *any* job. If it is not a job which the employee can do within that employee's limitation, then the agency has not operated within their mandate and an offer within the meaning of the law has not taken place. What has taken place is an effective denial of restoration.
>
> To construe these various regulations otherwise leads to the inequitable result of putting a partially recovered employee at the total mercy of an agency who may make an offer, as in the instant case, that is totally inconsistent with what the can or [cannot] do; thereby rendering the employee with no recourse because to question the propriety of a restoration they must be fully recovered. It is inconceivable that OPM and/or Congress intended such unfair treatment of partially recovered employees and a different and more fair treatment to fully recovered employees. If anything, the reverse would actually make more sense since partially recovered employees obviously still have a disability to contend with and the chances of them not being able to perform an offered agency job are therefore far greater.

Like *Jones, this petitioner is* a partially recovered Postal Service employee who has been receiving disability compensation benefits from the OWCP since he was removed from his position on August 14, 1987. This petitioner contends that he should be able to appeal to the MSPB for his lost wages and back pay because those lost wages occurred during the period of the infamous job offer (i.e. from 1980 to 1987) and like *Jones,* petitioner's treating physician, Dr. Dunn, opined (in a 1987 report) that the job offer was contraindicated to this petitioner's condition including the nite-time work. (See medical report of Dr. Dunn, Petitioner's combined

Rehearing and Suggestion for Rehearing In banc and Appendix pp A16-18).

The U. S. Postal Service countered *Jones'* allegation by saying that the issue was "whether the MSPB correctly held that it did not have jurisdiction to hear her appeal of the Postal Services' offer of re-employment." In addition, the Postal Service said in its brief at pp 10-12 that:

> In contrast, as a partially recovered former employee, Jones is entitled only to the limited right of appeal provided in 5 CFR § 353.401(a)(3), that provision states, as pertinent:
>
> > (3) Injured employees who partially recover may appeal to the MSPB for a determination of whether their agencies are acting arbitrarily and capriciously in denying them restoration....
>
> It is absolutely clear, therefore, that fully recovered former employees may challenge before the MSPB the nature of any restoration offer by their agency, as any failure to restore them, while partially recovered former employees may only appeal to the MSPB the complete denial of restoration, but not the terms of any re-employment offer. Therefore, the Final Opinion and Order by the MSPB in this case correctly concluded that it lacked jurisdiction, under 5 CFR § 353.401 (a)(3), *supra*, to decide an appeal by Jones —a partially recovered former employee — since she had not been denied restoration...
>
> The Postal Service acknowledge that, although 5 CFR § 353.401(a)(3), *supra*, by its express terms, limits the appeal rights of partially recovered former employees to claims that they were denied restoration arbitrarily, the MSPB has stated that it might assume jurisdiction in cases in which restoration offers to such persons were "so unreasonable as to be deemed an effective

denial of restoration." See Phillips v United States Postal Service, supra, at footnote 1. In this case, however, the Postal Service made a reasonable and appropriate restoration offer to *Jones,* specifying, in the aforementioned January 16, 1981 letter from the Oakland Post Office, that "(a)ll assigned duties will be in strict compliance with your limitations as prescribed by your physician.

Jones responded in her reply brief at 2 saying that:

> B. *MSPB Jurisdiction*
> Respondent cite the MSPB decision of Phillips v. U. S. Postal Service, MSPB docket number PH 0353810189 (November 30, 1981) which set forth the very argument that appellant has made in her opening brief; that a restoration may be so unreasonable as to be an effective denial of restoration and, thus, within the Board's jurisdiction (Phillips, supra, f.n. #1). (The Phillips decision is set out as an exhibit to Respondents' brief).

It is difficult to conceive how Mrs. Jones' offer of restoration could be any more patiently unreasonable:

1. She was offered the identical position from which she was forced to retire from due to her disability.
2. Before so retiring, and after her injury occurred, Mrs. Jones had attempted most or all of the tasks that are performed by a distribution clerk and the Post Office was unable to tailor the position to accommodate her disability. There has been no indication that Mrs. Jones' disability is any less now than at the time she was forced to retire.
3. Mrs. Jone's rehabilitation counselor expressly stated that Mrs. Jones could not perform the duties of a distribution clerk.

4. Mrs. Jones' treating physician expressly stated that Mrs. Jones could not safely perform the duties of a distribution clerk.

Since the offer is unreasonable, it constitutes an effective, or constructive denial of restoration and MSPB jurisdiction must be invoked per 5 CFR 353.401 (a) (3).

In an unpublished memorandum decided by the panel of the Ninth Circuit which may not be cited as precedent to or by the Courts of this Circuit save as provided in Rule 2(c), we find the following decision in Jones's case.

Petitioner, or disability retirement from employment by the United States Postal Service, sought review by the Merit Systems Protection Board (MSPB) of an offer by the Postal Service to re-employ her as a partially recovered employee in the position of night distribution clerk, the position she had last occupied before being placed on disability retirement. The offer stated, "All assigned duties will be in strict compliance with your limitation as prescribed by your physician."

In her appeal to the MSPB, Petitioner contended that because of her disability she was unable to perform the functions of the position of night distribution clerk as her past experience had demonstrated.

As to partially recovered employees, the regulations provide: "Injured employees who partially recover may appeal to the MSPB for a determination of whether their agency are acting arbitrarily and capriciously in denying them restoration...." A.R. 19-21; T. 243-4. 5 CFR § 353.401(a)(3) (1983).

Because of the offer of restoration had been made by the Postal Service, the Board held that the Postal Service could not be said to have denied restoration and, accord-

ingly, that the Board could not be said to have jurisdiction under the regulations to review the merits of the offer. It denied the petition for review, and Petitioner has appealed that order to this Court.

MSPB acknowledges that in *Phillips v United States Postal Service,* MSPB Docket no. PH 3538110189 (November 30, 1981), the Board has taken the position that it might assume jurisdiction in cases in which the restoration offer was "so unreasonable as to be deemed as effective denial of restoration." Respondent/Appellees' Brief, page 12. Petitioner contends that the offer to restore her to a position which her experience had demonstrated she was physically unable to fill was so unreasonable as to be deemed an effective denial of restoration.

In our judgment the Board does have jurisdiction to deal with this contention. Accordingly, the matter must be remanded to the Board for it to determine whether the offer of the Postal Service was so unreasonable as to be an effective denial of restoration and thus bring review of that denial within its appellate jurisdiction.

IT IS SO ORDERED.

In comparing and contrasting Jones's case to the instant case, like Jones it is difficult for this petitioner to conceive how a job offer of restoration can be any more patently unreasonable or unsuitable. Because like Jones:

1. The position in question or job offer is the identical position from which this petitioner was force to retire from due to his disability.
2. Like Jones, before retiring, and after his injury occurred, this petitioner had attempted most or all of the tasks that are performed by a modified distribution clerk and the Postal Service refuse to tailor the

position to accommodate his disability. Petitioner's disability is no less now than at the time he was removed and force to retire.

3. Petitioner, unlike Jones did not have a State Rehabilitation Counselor to help and assist him. The OWCP had the responsibility to monitor the progress of injured employees like petitioner but we know now that the OWCP acquiesced while the respondent USPS and Injury Compensation Supervisor, Barry J. Taquino, ran amuck over this petitioner's due process rights

4. Like Jones, This petitioner's treating physician, Dr. Dunn, expressly stated in an 1987 report that the job this petitioner was performing is contraindicated for his condition. See petitioner's Combined In banc Rehearing and Appendix at A 16-18.

However, Dr. Dunn stated this opinion prior to petitioner's removal in 1987 because as we know he was not afforded the opportunity to comment on the job offer prior to when it was made in 1982 because again, Injury Compensation Supervisor, Barry J. Taquino, who was aware of Petitioner's treating physician Dr. Dunn, as early as 1980, choose to ignore Dr. Dunns' input. If this was negligence may be it can be excuse but Respondent, United States Postal Service and Injury Compensation Supervisor, Barry J. Taquino, had prior knowledge of Dr. Dunn relationship with petitioner before the job offer was made in 1982. (See appendix D, Dr. Dunn note of 8/1/80 and U. S. Postal Service superimposed stamp receipt dated August 8, 1980). Petitioner suggest that this prior knowledge is proof that the avoidance by Respondent, United States Postal Service, of this Petitioner's treating physician input with respect to the job offer was an intentional act of denial of due process.

Another similar case dealing with unreasonable

restoration is *Scott v U. S. Postal Service,* 59 MSPR 245,249 (1993), that Board said:

> The appellant's contention that the agency did not intend to modify the duties of the Supervisor of mails position so that it would meet her medical limitations is supported by little more than her presumption that this was the case. The mere fact that the offer involved the same position which the appellant tried unsuccessfully a few months earlier is insufficient to establish that the position could not and would not be modified to conform to appellant's medical limitations. The agency stated affirmatively that the position would be subject to the condition that she be on her feet no more than two hours per day. We will not assume, and the appellant was not entitled to assume, that this statement was meaningless or made in bad faith. If she was concerned as to whether or how the agency proposed to modify the duties of the position to conformed to her medical limitations, it was incumbent on her to ask how this was to be done. There is no evidence that she did so. Instead, she simply declined the offer.
>
> We note that the Rehabilitation Counselor, in a report dated July 22, 1991, stated that "the job being offered [is] the one she previously accepted and tried," which "proved to be non-feasible given this individual's current limitations." Af, Tab 4A. He recommended that the agency consider other employment alternatives, because "it appears to me that since the previous job offer was found to be non-suitable." *Id.* The Rehabilitation Counselor's conclusion is entitled to little weight, however, because he appears to have relied only on the appellant's contention that the July offer was non-suitable, rather than on another independent analysis of the job. See *id.*

This Petitioner contends that contrary to the belief in the statement in his Job offer (which states that "The agen-

cy was going to modify the duties of the position to conform to his medical limitations,") it was actually made in bad faith. Petitioner says this because after he accepted the job offer under protest in April of 1982 and worked the job for almost a year with limitations such as no prolong walking or standing, no squatting, kneeling or climbing. (See appendix E New Orleans Post Office, Limited Duty Identification Card 11/17/82 to 5/17/83) respondent, Injury Compensation Supervisor, Barry J. Taquino, evidently requested from petitioner's orthopedic surgeon a change in petitioner's climbing limittion. As evidence by letter of Dr. James T. William, orthopedic surgeon dated March 11, 1983, (See appendix F) he succumbed to Taquino's request. As a result, by letter dated March 17, 1983, (See appendix G) Taquino issued an edict for this petitioner to climb the stairs to and from his work sight on the second floor of the Postal Facility and cc (carbon copy) that edict to the OWCP, according to the evidence of record.

As you can see appendix H (a note by A. Dupuy, tour superintendent-tour - 1 March 19, 1983) indicates that edict was carried out and was not rescinded until six weeks later when the climbing proved to exacerbate this petitioner condition. Particularly, the knee in which petitioner had surgery on swelled to a point where the orthopedic surgeon Dr. William, had no choice but to recant and request that the agency accommodate this petitioner's no climbing limitation. (See appendix I letter of Dr. William May 3, 1983). Certainly one can see why this petitioner would suspect any claim of good faith compliance with his physical limitation. This request by Taquino to liberalize this petitioner's limitations (i.e. from no climbing to climbing) was egregiously volatile. This is because, as mentioned earlier, pursuant to U.S. Postal Service—Employee and Labor Relation Manual-Subchapter 546.33 says:

> (c) The medical officer will make a statement of concurrence with the OWCP documented medical limitations or further restrict the former employee's work

> limit tolerances. The medical officer can in no way liberalize the medical limitations tendered by the OWCP district offices.

Evidently, Taquino found a way to circumnavigate the above provision. Moreover, if the above section had been adhered to by Taquino as required, it would have been documented on form 2485-Certificate of Medical Examination which is designed *inter alia* to ferret out any concurrent injury. (i.e. Petitioner's emotional Stress injury which took almost eleven years (1/1/80 to 10/11/90) to be accepted). It appears Taquino'a action was again intentional because as Injury Compensation Supervisor it was his job to follow all Federal rules, regulations, guidelines and procedures of the U.S. Postal Service-Employee and labor Relation Manuel-Chapter 540 Injury Compensation program - Subchapter 546.33.

With regards to the Board's decision in *Scott* which said "... The Rehabilitation Counselor's conclusion is entitled to little weight however, because he appears to have relied only on the appellant's contention that the July offer was non-suitable, rather than on as independent analysis of the job...." *id.* This petitioner contends that, who he relied upon (when he protested that the job he was being offered was not suitable) should carry a lot of weight. For example, he relied upon the Respondent, USPS. In the panel's decision of the instant case at 2 note 2 says "Jenkins appealed the suitability of the position in 1982, but the appeal was dismissed (Docket No. DA 03538210480)." As the record will show, the reason why the appeal was dismissed because the Respondent, USPS, admitted to the MSPB that it erred administratively is advising this petitioner to appeal the job *suitability* determination to the MSPB. (See initial brief of petitioner at p. 6 and appendix at p. A-16).

Conclusion

The *suitability* determination of a job offer for a person in petitioner's status rest with the OWCP (See Chapter

810 Injury Compensation Subchapter 8 Long Term Disability Claims of the Federal Personnel Manual). As petitioner has said all along that Respondent, USPS, never corrected its error by not determining the job offer suitability as required by the Statute 5 USC § 8106(c)(2) and the laws and cases interpreting that statute. [see 20 CFR § 10.123 (1982) and The Employees Compensation appeals Board (ECAB) case i.e. *Harry B. Topping Jr.,* 33 ECAB 341, 345 (1981). Certainly by respondent's USPS, own admission, substantial weight should be given to the issue of the unsuitableness of the job offer. This admission not only proves that the job offered to this petitioner by the Respondent, USPS, was not only so unreasonable as to be an effective of denial of restoration but was outrageous and not in accordance with procedures required by law.

Therefore, like *Jones,* since this petitioner's job offer was unsuitable and so unreasonable, it constitutes an effective, or constructive denial of restoration and MSPB jurisdiction must be invoked per 5 CFR 353.401 (a) (3).

I certify under penalty of perjury under the laws of the United States of America pursuant to 28 USC 1746 that foregoing is true and correct.

executed on April 16, 1997

Respectfully Submitted,

Charles J. Jenkins, Pro se Petitioner
11261 N. Idlewood Court
New Orleans, Louisiana 70128
504 243-0454

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

96-3293

CHARLES J. JENKINS,
Petitioner,

V.

UNITED STATES POSTAL SERVICE,
Respondent.

Decided: December 9, 1996

Before ARCHER, *Chief Judge,* MICHEL and PLAGER, *Circuit Judges.*

MICHEL, *Circuit Judge.*

Charles J. Jenkins ("Jenkins") seeks review of the May 8, 1996 decision of the Merit Systems Protection Board ("the Board") dismissing for lack of jurisdiction jenkins' appeal alleging that the United States Postal Service ("USPS" or "the agency") failed to pay him for lost wages and back pay. Because Jenkins failed to prove, or even sufficiently allege, facts establishing jurisdiction, the decision of the Board is *affirmed.*

Jenkins was employed as a letter carrier between 1972 and 1979. After suffering an on-the-job injury in 1974 and undergoing knee surgery in 1979, Jenkins was placed on temporary limited duty status. In 1982, he was offered and accepted the permanent limited duty position of modified

distribution clerk.[1] In 1986 he was removed from that position for failure to maintain his assigned work schedule. After filing an appeal with the Board and entering into a last chance settlement agreement, he was reinstated to the position of modified distribution clerk. However, Jenkins was again removed in 1987 for absence without leave, failure to maintain his work schedule and tardiness.[2] Jenkins received a disability retirement annuity after his removal. In 1990, the Office of Workers' Compensation Programs accepted his claim for an aggravated underlying emotional illness caused by his employment, dating back to 1980.

On February 2, 1996, Jenkins filed an appeal with the MSPB alleging that he "was terminated from a job that was never determined to be suitable and lost substantial wages as a result" and that the agency's refusal to "make the appellant whole" violated the Back Pay Act. He claimed he was due back pay for the period from 1980-1990.

The Board notified Jenkins in an Acknowledgment Order that it might not have jurisdiction over his appeal and ordered him to file evidence and argument to prove that the appeal was within the Board's jurisdiction. Jenkins' response argued that "back pay owed to him is based upon improper restoration which caused [him] to suffer substantial lost wages and subsequent removal from his job." In sum, he contended that the modified distribution clerk position was not a suitable position and therefore he was never properly restored. In addition, Jenkins wrote:

> As a result of the job offer never being determined suitable as required by 5 U.S.C. 8106(c)(2), the appellant was never properly restored to duty and was

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[1] Jenkins appealed the suitability of this position in 1982, but the appeal was dismissed (Docket No. DA03538210480).

[2] Jenkins appealed his removal to the Board (Docket No. DA07528710628) and, ultimately, to this court (Docket No. 88-3308).

> removed on August 14, 1987, due to a compensable injury or for reasons substantially related to a compensable injury. [See 5 USC 8151 and 5 CFR 353.103(b)]

Jenkins also cited two cases, *Roche v. United States Postal Service,* 828 F.2d 1555, (1557 (Fed. Cir. 1987) ("Roche could appeal the denial of restoration rights if he could show that his removal was the result of a compensable injury or was substantially related to a compensable injury." (footnotes omitted)), and *Ruppert v. United States Postal Service,* 8 M.S.P.B. 256 (1981), for the proposition that jurisdiction attached if he could demonstrate that his removal was the result of his injury.

The Board held that it lacked jurisdiction over Jenkins' appeal. As for the alleged improper restoration, the Board held that it had no jurisdiction because as a partially recovered employee who was returned to a limited duty, he could only appeal the agency's failure to restore him at all and not an allegedly improper restoration. *Bearksdale v. United States Postal Serv.,* 31 M.S.P.R. 305, 306 (1986). The Board also found that Jenkins had not submitted any evidence to show that he had been affected by an adverse action or that the agency failed to inform him of his rights concerning any such adverse action. The Board made no mention of Jenkins' argument regarding whether his removal was due to his injury.

Jenkins makes two main arguments here regarding jurisdiction. First, he argues jurisdiction arises because the 1982 job offer had never been determined to be suitable and therefore he was not properly restored to duty. The Board

determined there was no merit to this argument, and we agree. *See Bearksdale,* 31 M.S.P.R. at 306 n." ("Employees who have only partially recovered from compensable injuries have a limited right of appeal to the Board. They may only appeal the denial of restoration to duty. Since these appellants have not been denied restoration, there is no right of appeal to the Board.").

Second, Jenkins argues jurisdiction arises because his 1987 termination was for a cause related to his injury. Initially, we do not accept the agency's argument that Jenkins did not fairly raise this issue before the Board. Although the thrust of Jenkins argument to the Board was certainly that the 1982 position had not been determined to be suitable, Jenkins also clearly raised the issued of the appropriateness of his removal by stating he was removed in 1987 due to a compensable injury and by citing relevant case law. *See Roche,* 828 F.2d at 1558 (holding petitioner had sufficiently alleged he was removed due to a compensable injury where petitioner cited relevant statute and regulation, cited and explained relevant cases, and submitted a doctor's report).

Merely raising this issue is not sufficient, however, to establish jurisdiction in the Board. Jenkins bore the burden of proving the factual predicate of jurisdiction by a preponderance of the evidence. *See Stokes v. Federal Aviation Admin.,* 761 F.2d 682. 685 (Fed. Cir. 1985); 5 C.F.R. § 1201.56(a)(2) (1995). By failing to even assert any facts which, if true, would support his allegation of improper removal, Jenkins failed to meet his burden. *Stokes,* 761 F.2d at 686 ("A merely conclusory pleading is insufficient."). Thus, this case is unlike *Roche,* 828 F.2d at 1558, where the appellant both specifically alleged that his termination was due to his

injury and submitted a doctor's report to support the allegation that his termination was related to his injury. Moreover, in light of the absence of any factual allegations to support his assertion of improper removal based on his injury, the Board did not err in not granting Jenkins an evidentiary hearing.

Jenkins makes several other arguments unrelated to jurisdiction, *e.g.* the Board erred when it stated he had retired in 1987 and the Board erred in denying Jenkins' motion to compel discovery. We see no merit to any of these arguments. In any event as they do not bear on the only issue we need review, jurisdiction, we need not decide them.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTON BOARD
DALLAS FIELD OFFICE

CHARLES J. JENKINS, Appellant,	)	**DOCKET NUMBER** DA-3443-96-0268-I-1
v.	)	
UNITED STATES POSTAL SERVICE, Agency.	)	**DATE: MAY - 8 1996**

Charles J. Jenkins, New Orleans, Louisiana, pro se.

Mack A. Boyd, New Orleans, Louisiana, for the agency.

BEFORE

Sharon Fonsworth Jackson
Administrative Judge

INITIAL DECISION

Charles J. Jenkins filed an appeal on February 2, 1996, alleging that the agency failed to pay him for lost wages and back pay.

The appeal is DISMISSED for lack of appellate jurisdiction.

JURISDICTION

The appellant bears the burden of proof on the issue of jurisdiction.

In his appeal, the appellant stated that his appeal involves a pay dispute for lost wages and back pay covering periods from 1980 to 1990. He alleged that: (1) the agency's "withholding" of his back pay and lost wages was an adverse action; (2) the agency's refusal to "make his whole" violated the Back Pay Act; and (3) the agency should have informed him of his appeal rights. He also contended that the agency and the Department of Labor conspired to violate his civil rights by denying him due process and that the agency discriminated against him on the basis of race, age, and handicap. Appeal File, Tab 1.

Along with his appeal, the appellant submitted documents which reflect that he was employed with the agency from 1972 until 1979, as a letter carrier. As the result of an on-the-job injury sustained in 1974, the appellant was offered and accepted assignment to the limited duty position of modified distribution clerk in 1980. He filed an appeal with the Board concerning the suitability of the job offer in 1982 and his appeal was dismissed because the Board lacked jurisdiction. In November 1986, the agency effected the appellant's removal for "failure to maintain assigned work schedule." The appellant filed an appeal with the Board and in a settlement agreement between the appellant and the agency, he was reinstated. On August 14, 1987, the appellant

retired from Federal service under the Civil Service Retirement System and began receiving a disability retirement annuity. In October 1990, the Department of Labor's Office of Workers' Compensation (OWCP) accepted the appellant's claim for compensation from August 1987 to November 1990, based on an "aggravated underlying emotional illness' caused by his employment. OWCP reimbursed the Office of Personnel Management for the disability annuity paid to the appellant from August 15, 1987, through November 30, 1990. Appeal File, Tabs 1, 4, 5.

The Board's Acknowledgment Order, dated February 6, 1996, advised the appellant that the Board may not have jurisdiction over his appeal and that his appeal appeared to be untimely filed. This Order also advised him that he bears the burden of proof on the jurisdiction and timeliness issues and provided him an opportunity to submit evidence and argument to establish the Board's jurisdiction and that his appeal was timely filed. Appeal file, Tab. 2.

The agency responded to the Acknowledgment Order with a motion to dismiss, asserting that the Board lacked jurisdiction and that the appeal was untimely filed.[1] The agency indicated that the appellant retired on August 14, 1987. Appeal File, Tab 4.

In response to the Acknowledgment Order, the appellant asserted that he is owed back pay based upon his improper restoration and that the Board has jurisdiction over his appeal. He contended that the job offer to the modified

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[1] The appellant also responded to the timeliness of his appeal. Because the appeal is dismissed for lack of jurisdiction, no finding is made on the issue of timeliness of filing.

distribution clerk position was not determined to be a suitable offer and therefore, he was never properly restored to duty after his compensable injury. He indicated that, although he was compensated for the period 1980 to 1987, he lost wages and back pay for the "unjustified or prohibited personnel action which occurred during the same period. . .pursuant to the Back Pay Act." He stated that the agency incorrectly informed him to file an appeal with the Board concerning the "job suitability determination" and his appeal was dismissed for lack of jurisdiction. Appeal File, Tabs 1, 5.

The appellant also submitted copies of letters to OWCP and the agency in which he damanded payment for lost wages and back pay for the period January 1, 1980 to August 15, 1987. According to the appellant's submissions, in December 1992 the agency informed the appellant that his claim for compensation during this period was processed in accordance with the Federal Employees' Compensation Act. However, the appellant claims that, because he was "forced to work in a job that was never determine [sic] to be suitable," he was affected by an unwarranted personnel action resulting in a reduction or denial of pay which was otherwise due to him. Appeal File, Tab 4.

The Board lacks jurisdiction over this appeal.

A Federal employee may appeal any action to the Board which is appealable under any law, rule, or regulation. 5 U.S.C. § 7701 (a). The Board's jurisdiction is not plenary in nature; rather, it is limited to areas specifically conferred on it by statute or regulations. See *Manning v. Merit Systems Protection Board,* 742 F.2d 1424, 1427 (Fed. Cir. 1984).

The Board has jurisdiction over an appeal from an employee or former employee covered by 5 C.F.R. part 353 involving an agency's failure to restore or an alleged improper restoration. Part 353 of the regulations covers the rights and obligations of employees and agencies in regard to restoration under 5 U.S.C. § 8151. *See* 5 C.F.R. § 353.101. The appellant admitted that he has been on OWCP total disability rolls since August 14, 1987. Appeal File, Tab 5. At time he accepted the limited duty position, he was only a partially recovered employee. As a partially recovered employee who was returned to a limited duty position, the appellant could only appeal the agency's failure to restore his and not an alleged improper restoration. See *Barksdale v. United States Postal Service,* 21 M.S.P.R. 305, 306 (1986); 5 C.F.R. § 353.401 (1982). In any event, the appellant filed an appeal in 1982 concerning his "alleged" improper restoration.

As to the appellant's contention that he has been affected by an adverse action, the appellant has not submitted any information to show that he has been affected by an appealable adverse action or that the agency failed to inform him of his appeal rights concerning such adverse action. There is no law, rule, or regulation which permits the Board to review matters concerning back pay claims other than as part of relief granted in an otherwise appealable action that has been adjudicated by the Board. I therefore find that the appellant has failed to state a cause of action within the Board's appellate jurisdiction and his appeal must be dismissesd.[2]

---

[2] A review of the appellant's discovery request indicates that the requested information concerns documents related to his OWCP claim and the suitability of the limited duty position offered by the agency. Because none of the information requested addresses the jurisdictional issue in this

Allegations of discrimination and prohibited personnel practices do not give the Board jurisdiction over this appeal.

In his appeal, the appellant asserted that he had been discriminted against based on race, age, and handicap and that the agency had committed prohibited personnel practices. Appeal file, tab 1. Allegations of discrimination and prohibited personnel practices, however, are not independent sources of appellate jurisdiction. In the absence of an appealable action, the Board does not have jurisdiction over allegations of discrimination and prohibited personnel practices. *Wren v. Department of the Army,* 2 M.S.P.R. 1 (1980), *aff'd sub nom. Wren v. Merit Systems Protection Board,* 681 F.2d 867 (D.C. Cir. 1982).

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/ Sharon Fonsworth Jackson
Sharon Fonsworth Jackson
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on *Jun 12 1996,* unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for

---

footnote 2 continued

appeal, his motion to compel discovery is denied. See *Bedynek-Stumm v. Department of Agriculture,* 57 M.S.P.R. 176, 179 (1993).

review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state you objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the Administration Judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX C

United States Court of Appeals for the Federal Circuit

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the PETITIONER, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petitioner for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on Jnuary 30, 1997 unless another time becomes appropriate under Rule 41.

FOR THE COURT,
JAN HORBALY, CLERK

Dated: January 21, 1997

By PLD

Brian P. LeDuc
Associate Chief Deputy Clerk

cc:CHARLES J. JENKINS
JUDITH L. SCHLOSSBERG

FILED
U.S. COURT OF APPEALS
FOR
THE FEDERAL CIRCUIT

JAN 21 1997

JENKINS V USPS, 96-3293
(MSPB - DA3443960268I-1)

CLERK

****
*
* Note: Pursuant to Fed. Cir. R. 47.6, this order *
* is not citable as precedent. It is a public record. *
*
****

BEST AVAILABLE COPY

BURDON-SMITH CLINIC

1401 DELACHAISE STREET
NEW ORLEANS, LOUISIANA 70115
TELEPHONE 899-1335 • 897-2441

840 W. 5TH STREET
LA PLACE, LOUISIANA 70068
TELEPHONE 652-1955

Arthur P. Burdon, M.D.
BNDD #AB4287884

George C. Dunn, Jr., M.D.
BNDD AD #7369775

Charles Rodney Smith, M.D.
BNDD #AS3382049

RECEIVED AUG 13 1980 LA

Name Mr. Charles Jenkins

Address _____ Date 8/1/82

℞

I saw Mr. Jenkins this date. In my opinion Mr. Jenkins was unable to work from 7/25/80 - today because of medical problems. He may return to work tonight if he feels able to work

☐ Label
Refill _____ Times

Appendix - D

APPENDIX E

NEW ORLEANS POST OFFICE 326
LIMITED DUTY IDENTIFICATION CARD

NAME JENKINS, Charles
SS# 437-68-1661 **PAY LOC:** 950 **OFF DAYS** Regular
EFFECTIVE DATE 11/17/82 **EXP. DATE** 5/17/83
RESTRICTIONS & LIMITATIONS No prolonged walking or standing, No squatting, kneeling or climbing...

APPROVED: MR. BARRY TAQUINO, INJURY COMPENSATION SUPERVISOR.
BY: s/s M.L. Ricaud, R.N.

M. L. RICAUD, R. N.

APPENDIX F

REDLER BROWN WILLIAMS
ORTHOPAEDIC CLINIC

A Professional Medical Corporation

IRVING REDLER, M.D.
GERNON BROWN, JR.,M.D.
JAMES T. WILLIAMS, M.D.
A.N. DIODENE', JR. , M.D.

RECEIVED
MAR 16 1983

Administrator
JOY COYLE

1538 LOUISIANA AVENUE
NEW ORLEANS, LOUISIANA 70115
TELEPHONE 891-3726

March 11, 1983

Mr. Barry J. Taquino, Injury Compensation Supervisor
U. S. Postal Service
701 Loyola Avenue
New Orleans, LA 70113-9998

Re: *Mr. Charles J. Jenkins*

Dear Mr. Taquino:

This is in response to your letter of March 8, 1983 regarding Mr. Charles Jenkins. At the time of my most recent examination of Mr. Jenkins on February 8, 1983, I did not find any orthopaedic reason why the patient should not be able to

climb approximately 40 steps ascending about 16 feet on arrival at work and again after completion of his work day.

Very truly yours,

/s/ James T. Willaims, M.D.
James T. Williams, M.S.

JTW/cnl

Received March 29, 1983
C. Jenkins

APPENDIX G

BJT: cas

March 17, 1983

Charles Jenkins
Limitations

Supt., Tour I

The attached is being forwarded for your review and issuance to Mr. Jenkins. Please advise Mr. Jenkins that he should use the stairs and not the elevator, effective immediately. This is a medical decision and not open to discussion with anyone except the physician.

Barry J. Taquino
Injury Compensation Supervisor

CC: OWCP A7-116754

Health Unit

Mr. Charles Jenkins
2125 Delery St.
New Orleans, LA. 70117

BEST AVAILABLE COPY

U.S. POSTAL SERVICE ROUTING SLIP	DEPT., OFFICE OR ROOM NO.	
TO: 1 Supv. Dominick		☐ APPROVAL ☐ SIGNATURE ☐ COMMENT ☐ SEE ME ☐ AS REQUESTED ☐ INFORMATION ☐ READ AND RETURN ☐ READ AND FILE ☐ NECESSARY ACTION ☐ INVESTIGATE ☐ RECOMMENDATION ☐ PREPARE REPLY
2		
3		
4		
5		
FROM: A. Duguay Supt. T-I		EXTENSION
DATE 3/19/83		ROOM NO

REMARKS:

Please see that Mr. Jenkins receives the attached. Also assure that he understands he is to use the stairs and not the elevators. This is effective immediately.

Rec. Mar. 22, 1983

A. Duguay

ITEM 0-13
Aug. 1976 (Formerly Form 1

☆ U.S. GOVERNMENT PRINTING OFFICE

Appendix - H

APPENDIX I

REDLER BROWN WILLIAMS
ORTHOPAEDIC CLINIC

A Professional Medical Corporation

IRVING REDLER, M.D.
GERNON BROWN, JR.,M.D.
JAMES T. WILLIAMS, M.D.
A.N. DIODENE', JR. , M.D.

RECEIVED
MAY 5 1983

Administrator
JOY COYLE

1538 LOUISIANA AVENUE
NEW ORLEANS, LOUISIANA 70115
TELEPHONE 891-3726

MAY 3, 1983

Mr. Barry J. Taquino, Injury Compensation Supervisor
U. S. Postal Service
701 Loyola Avenue
New Orleans, LA 70113-9998

Re: *Mr. Charles J. Jenkins*

Dear Mr. Taquino:

It is my opinion that it may be beneficial to have Mr. Charles Jenkins ride the elevator upon arrival and departure from work.

Very truly yours,
/s/ James T. Williams, M.D.
James T. Williams, M.D.

JTW/jc